

*a***AMERIASA TOURS & TRAVEL SDN BHD****v.****PJB PACIFIC ADVISORY SERVICES SDN BHD***b*

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[COMPANIES WINDING UP NO: D4-28-539-2003]
8 APRIL 2004

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COMPANY LAW: *Winding up - Provisional liquidator - Application by petitioner to appoint - Principles - Good prima facie case for winding-up order - Urgency of filing application and delay - Whether sufficient ground for appointment of provisional liquidator shown - Whether nature of assets properly described - Whether background of proposed provisional liquidator furnished - Companies Act 1965, s. 231 - Companies (Winding-up) Rules 1972, r. 35(1), (2)*

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This was an application by the petitioning creditor ('the petitioner') for the appointment of a provisional liquidator pending the hearing of the winding-up petition it had earlier presented against the respondent company. The notice of motion was filed pursuant to s. 231 of the Companies Act 1965 ('the Act') and r. 35 of the Companies (Winding-up) Rules 1972 ('the Rules') together with a supporting affidavit wherein it was averred that the preservation of the status quo and the immediate appointment of a provisional liquidator was imperative as otherwise the assets of the respondent would be dissipated.

*e**f***Held (dismissing the motion):***g*

[1] The court has to be cautious in dealing with applications for the appointment of provisional liquidators as it must not be seen as though it were prejudging the issues. The appointment of a provisional liquidator does not lead invariably to the making of a winding-up order. Nevertheless, a petitioner must show a good *prima facie* case for the grant of a winding-up order if it is to succeed in its application for the appointment of a provisional liquidator. (pp 588 h, 589 a-c & 590 e-h)

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[2] There was a grievous lack of urgency on the part of the petitioner in filing the motion despite its claim that there was a real danger that the respondent's assets would be dissipated. Usually, an application for the appointment of a provisional liquidator is filed immediately upon the presentation of a petition. Here, the petition was filed on 5 June 2003 whereas the motion was only filed on 3 December 2003. This was an unreasonable delay. (pp 590 d & 592 a-c)

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[3] The petitioner had failed to comply with r. 35(1) and (2) of the Rules. Its affidavit in support of the motion was ambiguous and did not offer proof of 'sufficient ground' for the appointment of a provisional liquidator. The petitioner had also failed to 'state the nature and give a short description' of the properties of which the provisional liquidator was to take possession; no assets or properties were even specified or itemised. The motion was, therefore, frivolous, vexatious and an abuse of the process of the court. (pp 590 b-c, 592 h & 593 a-b)

[4] The petitioner had also failed to exhibit the curriculum vitae or resume of the proposed provisional liquidator in order to show that he met the requirements of the Act. (p 593 g-h)

Case(s) referred to:

Hongkong and Shanghai Banking Corporation Ltd v. Kemajuan Bersatu Enterprise Sdn Bhd [1992] 2 MLJ 370 HC (*refd*)
Kong Long Huat Chemicals Sdn Bhd v. Raylee Industries Sdn Bhd [1998] 5 CLJ 310 HC (*refd*)
Omarjee v. Lincoln Hunt Australia Pty Ltd [1986] 4 ACLR 205 (*refd*)
Pac Asian Services Pte Ltd v. European Asian Bank AG [1989] 3 MLJ 385 (*fol*)
Pitt v. Bachmann [1980] 5 ACLR 282 (*refd*)
Re Carpark Industries Pte Ltd [1967] 86 WN (Pt 1) NSW 165 (*refd*)
Re Cilfoden Benefit Building Society [1868] LR 3 Ch App 462 (*refd*)
Re Club Mediterranean [1975] 11 SASR 481 (*refd*)
Re Highfield Commodities Ltd [1984] 3 All ER 884 (*refd*)
Re KVE Homes Pty Ltd [1979] 4 ACLR 47 (*refd*)
Re Lo Siong Fong [1994] 2 MLJ 72 (*refd*)
Re McLennan Holdings Pty Ltd [1983] 7 ACLR 732 (*refd*)
Re ML Industries Pty Ltd [1981] 5 ACLR 769 (*refd*)
Re Roadmakers Pte Ltd [1985] 3 ACLC 591 (*refd*)
Re Saldowa Pty Ltd [1986] 4 ACLR 200 (*refd*)
Re Union Accident Insurance Co Ltd [1972] 1 All ER 1105 (*refd*)
Re Yick Fung Estates Ltd [1986] HKLR 240 (*refd*)
TN Metal Industries Sdn Bhd & Ors v. Ng Pyak Yeow [1996] 4 MLJ 567 (*refd*)

Legislation referred to:

Companies Act 1965, s. 231
Companies (Winding-Up) Rules 1972, r. 35(1), (2)
Rules of the High Court 1980, O. 8 r. 3(2)

Companies Act 1948 [UK], s. 238

For the petitioner - Shalinee Fernandez; M/s Hakem Arabi & Assocs
For the respondent - Wan Muhammad Amin Wan Yahya; M/s Zainal Abidin & Co

Reported by Gan Peng Chiang

*a***JUDGMENT****Abdul Malik Ishak J:****Enclosure 5 – Appointment Of A Provisional Liquidator**

By way of a notice of motion in encl. 5, the petitioner craves for the following prayers:

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1. Shanmughanathan a/l Vellanthurai from Shan & Co be appointed as (a) Provisional Liquidator under Section 231 (of the) Companies Act 1965 and/or (under) Rule 35 (of the) Companies (Winding-up) Rules 1972 till the hearing of the winding-up petition on 16.01.2004 upon (the) terms and limitations as (set out hereunder):

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- (i) to enter and control all the assets of the Respondent's company; and
- (ii) the provisional liquidator shall not delegate his function to an agent (or) agents.

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2. The appointment of Shanmughanathan a/l Vellanthurai as (a) Provisional Liquidator is to be effected immediately and/or until otherwise ordered by this Honourable Court.

3. All the Provisional Liquidator's cost(s) including his fees and other expenditures incurred in carrying out his duties is to be paid from the assets of the Respondent before hand.

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4. The cost(s) of this application is to be borne by the Respondent from the realisation of the sale of proceeds of its assets.

5. Such other orders and/or relief (that) this Honourable Court deem(s) fit and/or fair.

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Section 231 of the Companies Act 1965 (Act 125) (Revised 1973) (hereinafter referred to as the "Act") enacts as follows:

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The Court may appoint the Official Receiver or an approved liquidator provisionally at any time after the presentation of a winding up petition and before the making of a winding up order and the provisional liquidator shall have and may exercise all the functions and powers of a liquidator subject to such limitations and restrictions as may be prescribed by the rules or as the Court may specify in the order appointing him.

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and that certainly vests the court with a wide discretionary power to appoint a provisional liquidator at any time after the presentation of a winding up petition and before the making of a winding up order. One may ask, who is entitled to apply under s. 231 of the Act? The answer is not far to seek. Rule 35 of the Companies (Winding-Up) Rules 1972 provides the answer. It states that the court may appoint a provisional liquidator on the application of any

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creditor or contributory. Apart from these personalities, the directors or the company itself fearing dissipation of the assets, may also apply to the court for the appointment of a provisional liquidator (*Re Highfield Commodities Ltd* [1984] 3 All ER 884). But I must be cautious in dealing with an application for the appointment of a provisional liquidator. I must not be seen to be pre-judging the issue of winding-up and disrupting the company's business (*Re Cilfoden Benefit Building Society* [1868] LR 3 Ch App 462). I must be seen to be impartial, open minded and forward looking. However, a caveat must be placed. The appointment of a provisional liquidator does not necessarily mean that this court will make an order winding-up the company, rather the appointment of a provisional liquidator serves as a temporary measure, a stop-gap of a sort. It must be borne in mind that the appointment of a provisional liquidator is meant to preserve the assets as well as to prevent prejudice to the contesting parties (*Re Carpark Industries Pte Ltd* [1967] 86 WN (Pt 1) NSW 165); it is an exercise in maintaining *status quo*.

Factual Background

The petitioner is a judgment creditor pursuant to a judgment dated 18 October 2002 that was obtained in the Kuala Lumpur sessions court *vide* summons no: S6-52-12685-02 for the sum of RM100,429. The winding-up petition was presented on 5 June 2003 pursuant to s. 218 of the Act. The petitioner filed a notice of motion as reflected in encl. 5 on 3 December 2003 (hereinafter referred to as "the motion") together with the affidavit in support affirmed by Chong Weng Siong on 2 December 2003 as seen in encl. 4 (hereinafter referred to as the "affidavit in support"). A statement of brief facts pursuant to O. 8 r. 3(2) of the Rules of the High Court 1980 was also filed and this was annexed to the motion.

The respondent has not filed any affidavit in reply but the learned counsel in the person of Mr. Wan Muhammad Amin bin Wan Yahya has intimated his desire to oppose the motion based purely on points of law as well as the insufficient evidence or the lack of it as reflected in the affidavit in support of the motion.

Arguments Advanced By The Petitioner

In support of the motion, the petitioner advances two main grounds:

- (1) "to maintain the *status quo* of the immediate and pressing condition of the respondent's company pending the outcome of the said petition" (the averments at para. 12 of the affidavit in support but not in the statement of brief facts); and

- a* (2) “the petitioner would be in a worse situation if the appointment of the provisional liquidator is delayed as the assets of the respondent’s company would have been dissipated unlawfully and there would have been nothing left to wind up except a formal order to sanction a *fait accompli*” (the averments in para. 13 of the affidavit in support as well as a brief reference to it in para. 2(g) of the statement of brief facts).
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c Ambiguity seems to be the hallmark of the petitioner. It is unclear as to what the petitioner meant by the words “immediate and pressing condition” in ground (1) above. They are mere words which are employed without condescending to the facts. Similarly ambiguity prevails when the petitioner uses the words “worse situation” as seen in ground (2) above. All these are unsatisfactory. It leaves much to be desired. It is open to criticism.

Decision Of The Court

d Of significance would be this. That there is an absence of urgency on the part of the petitioner in filing the motion as seen in encl. 5. A motion of this nature is usually made due to the urgency to maintain the *status quo* of the respondent company pending a winding-up order as there is a real likelihood nay a real danger that the respondent company would dissipate its assets. Seriously, is there a real danger that the respondent company would dissipate its assets? Certainly not.

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f To appoint a provisional liquidator, the petitioner must show a good *prima facie* case for a winding-up order (*Re Union Accident Insurance Co Ltd* [1972] 1 All ER 1105; *Re Roadmakers Pte Ltd* [1985] 3 ACLC 591; *Re KVE Homes Pty Ltd* [1979] 4 ACLR 47; *Re Yick Fung Estates Ltd* [1986] HKLR 240; and *Hongkong and Shanghai Banking Corporation Ltd v. Kemajuan Bersatu Enterprise Sdn Bhd* [1992] 2 MLJ 370 at 377). I would certainly be reluctant to appoint a provisional liquidator where an application for such an appointment is made for a collateral purpose (*Re Lo Siong Fong* [1994] 2 MLJ 72 at 82).

g Stringent steps must be undertaken by the petitioner before it is justifiable for this court to exercise its wide discretion to appoint a provisional liquidator. Thus, after having proven a good *prima facie* case, the petitioner must ultimately adduce concrete evidence for this court to weigh in a balance as to whether it would be appropriate to appoint a provisional liquidator. That concrete evidence may include the impending fear that the assets are likely to be dissipated or that there is a strong likelihood that the money would be siphoned off or that there is a blatant absence of the audited balance sheets to show the financial strengths or weaknesses of the respondent company (*Pac Asian Services Pte Ltd v. European Asian Bank AG* [1989] 3 MLJ 385 which reviews admirably *Re Highfield Commodities Ltd (supra)*; *Re Saldowa Pty Ltd*

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[1986] 4 ACLR 200; and *Omarjee v. Lincoln Hunt Australia Pty Ltd* [1986] 4 ACLR 205). Wee Chong Jin CJ delivered the decision of the Court of Appeal of Singapore in the case of *Pac Asian Services Pte Ltd v. European Asian Bank AG (supra)* and at p. 389 of the report this was what his Lordship said:

We agree with Sir Robert Megarry V-C in *Re Highfield Commodities Ltd* [1985] 1 WLR 149 at p 158, that the court will be slow to appoint a provisional liquidator unless there is at least a good prima facie case for saying that a winding-up order will be made. But that is only the threshold which the applicant must cross. It must still be asked whether it is right in the circumstances of the case that provisional liquidators be appointed.

In *Re Saldowa Pty Ltd* [1986] 4 ACLR 200, the company appealed against a decision of a master that a provisional liquidator be appointed. Fullagar J was of the opinion that there was a very wide discretion in the court to appoint a provisional liquidator. The learned judge dismissed the appeal but not before finding (at p 201, last paragraph):

that the petitioner, Galaxy International Pty Ltd, has good grounds for winding up the company, that it is likely that a winding-up order will be made on its petition and the application is brought mainly because of serious and, on the circumstances as they appear before me, and on the particular evidence before me, justified fears that if a provisional liquidator is not appointed and kept in office, assets are likely to be dissipated.

Similarly, in *Omarjee v. Lincoln Hunt Australia Pty Ltd* [1986] 4 ACLR 205, although the headnotes indicate that 'in the light of a *prima facie* case of insolvency having been made out the court's discretion would be exercised in favour of appointing a provisional liquidator', it is plain from p. 214 of the report that that was only a threshold question. The court had this to say:

I am satisfied that a *prima facie* case of insolvency has been made out.

The final aspect on the matter of relief is the exercise of discretion. I have taken the following into consideration.

The court then went on to consider five matters. These included the assertion that money was being siphoned off and the fact that the company made no attempt to deny this assertion; the fact that there were no audited balance sheets and that the company refused to give information; and the consideration that some urgent action in relation to the preservation of assets was needed but none taken. We are therefore of the view that, in the circumstances of our case, the bank must first show a good *prima facie* case of insolvency on the company's part, and then adduce other evidence to justify the appointment of provisional liquidators.

- a* It is trite that an application to appoint a provisional liquidator is usually made immediately after the petition is presented. Here, there is certainly an unreasonable delay in applying for this motion and this can be seen from the chronology of events as set out hereunder:
- b* (1) the petition was filed on 5 June 2003;
- (2) the petition was first fixed for hearing on 26 September 2003 and adjourned to 16 January 2004; and
- (3) this motion was filed on 3 December 2003.
- c* Mathematically speaking, this motion was filed approximately five (5) months and twenty eight (28) days after the petition was filed and approximately two (2) months and seven (7) days after the first date of hearing of the petition. Indeed if there exists a real risk that the respondent company would dissipate its assets then surely this motion should have been filed well before the
- d* petition's first hearing date on 26 September 2003. It can readily be surmised that the petitioner's intention in filing this motion is questionable.

Mr. Wan Muhammad Amin bin Wan Yahya strenuously contested the motion in encl. 5. The duty now falls on me to weigh the urgency of the Motion and the necessity for the appointment of a provisional liquidator at this point of

e time and then decide where the balance of convenience lies. Here, the petitioner has miserably failed to provide evidence as to the respondent's assets. Rule 35(1) of the Companies (Winding-Up) Rules 1972 states as follows:

f At any time after the presentation of a petition, the Court may, upon the application of any creditor or contributory of the company and upon proof by affidavit of sufficient ground for the appointment of a provisional liquidator make the appointment upon such terms as the Court shall think just or necessary.

This would be followed by r. 35(2) of the Companies (Winding-Up) Rules 1972 which states as follows:

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An order appointing a provisional liquidator in Form 13 shall state the nature and give a short description of the property of which the provisional liquidator is ordered to take possession and the duties to be performed by him.

h Thus, there is therefore the need on the part of the petitioner to show "proof by affidavit of sufficient ground for the appointment of a provisional liquidator" and the necessity to "state the nature and give a short description of the property of which the provisional liquidator is ordered to take possession" of. Here, the petitioner alleges that the respondent has "various properties,

i immovable, movable, tangible and/or intangible assets" which are "in jeopardy

of being dissipated off” as reflected at para. 7 of the affidavit in support. So, the crucial question to pose would be: what then are these assets that prompted the petitioner to file the motion in question? Nothing has been shown by the petitioner that the respondent has any assets capable of being dissipated. The affidavit in support does not itemise the assets of the respondent. Nothing is shown nor specified. If the respondent has no assets, then it is pointless to file the motion in encl. 5. It is an exercise in futility. I must accordingly hold that the motion is frivolous, vexatious and an abuse of the process of the court.

Alternatively, it must be emphasised that there is no danger of the respondent’s assets, if any, from being dissipated. Allow me to elaborate. The petitioner has alleged in the affidavit in support that:

- (i) the respondent had ceased operations from 9 September 2002 (see para. 5 of the affidavit in support and exh. “ATT1” annexed to the affidavit in support which is the respondent’s circular resolution dated 14 November 2002); and that
- (ii) the respondent’s investment licence had also expired on 27 January 2003 (see para. 6 of the affidavit in support and exh. “ATT2” annexed to the affidavit in support which is the letter from the Securities Commission dated 12 July 2003).

Now, since the respondent had ceased operations from 9 September 2002 and no longer in possession of an investment licence from 27 January 2003 there would therefore be no danger of dissipation of the respondent’s assets. It was whimsical thinking on the part of the petitioner to presume that the respondent, though dormant for over one (1) year, had a large amount of assets stashed away. The affidavit in support shows that the respondent is financially starved, so to speak.

The motion in encl. 5 mentions the proposed provisional liquidator by name. But alas, there is no background history provided by the petitioner of the proposed provisional liquidator. It is a common practice that when a motion to appoint a provisional liquidator is filed, the background of the proposed provisional liquidator should be furnished by exhibiting the curriculum vitae or resume of the proposed provisional liquidator in order to show that that individual is a person which meets the requirements of being a liquidator under the Act. Here, all that is known about the proposed provisional liquidator is by way of a letter dated 19 November 2003 annexed as exh. “ATT3” to the affidavit in support and that letter contains precious little. So it can be surmised that the reason why the petitioner has chosen the proposed provisional liquidator is uncertain and it certainly raises nagging doubts about the calibre of that

- a* individual. The power of the court to appoint a provisional liquidator is purely discretionary. That power must be exercised judicially and in a judicial manner and it must be based on cogent reasons.

- b* Section 231 of the Act plays a prominent role here. It is the relevant section to rely upon when an applicant like the petitioner seeks to appoint a proposed provisional liquidator. Section 231 of the Act gives the court the necessary judicial power to appoint a provisional liquidator (*TN Metal Industries Sdn Bhd & Ors v. Ng Pyak Yeow* [1996] 4 MLJ 567). Section 231 of the Act as phrased and framed gives the court a pure discretionary power to appoint a provisional liquidator and this is made abundantly clear and beyond dispute
- c* (*Kong Long Huat Chemicals Sdn Bhd v. Raylee Industries Sdn Bhd* [1998] 5 CLJ 310). Now, the English Companies Act 1948 has s. 238 and that section is in *pari materia* with our s. 231 of the Act. According to the case of *Re Highfield Commodities Ltd (supra)*, s. 238 of the English Companies Act 1948 confers on the court an unfettered discretionary power but “that power must obviously be exercised in a proper judicial manner” and that the need for the exercise of the discretion should outweigh the consequences to the company.
- d* The Australian courts too in *Re McLennan Holdings Pty Ltd* [1983] 7 ACLR 732; *Pitt v. Bachmann* [1980] 5 ACLR 282 and *Re ML Industries Pty Ltd* [1981] 5 ACLR 769 have adopted the same line of reasoning in that after the due presentation of a petition to wind up which discloses proper grounds for winding-up, the discretion to appoint a provisional liquidator is not limited in its scope. I venture to say that there may be an infinite variety of situations which may call for the court’s discretion to be exercised and so it would not be proper nor possible to restrict or curtail such a discretionary power to any narrow confines of rigidity by slotting them into classified categories. Indeed
- e* in *Re Club Mediterranean* [1975] 11 SASR 481, Bright J placed a caveat when he tried to compile an exhaustive list by stating that “commercial affairs are infinitely various”.
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- g* Judicial discretion is a precious commodity. It is exercisable on the facts as presented by the parties. In relation to the motion in encl. 5, the discretion ought not to be exercised in favour of the petitioner. I must, for the reasons as adumbrated above, dismiss the motion in encl. 5 with costs.

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